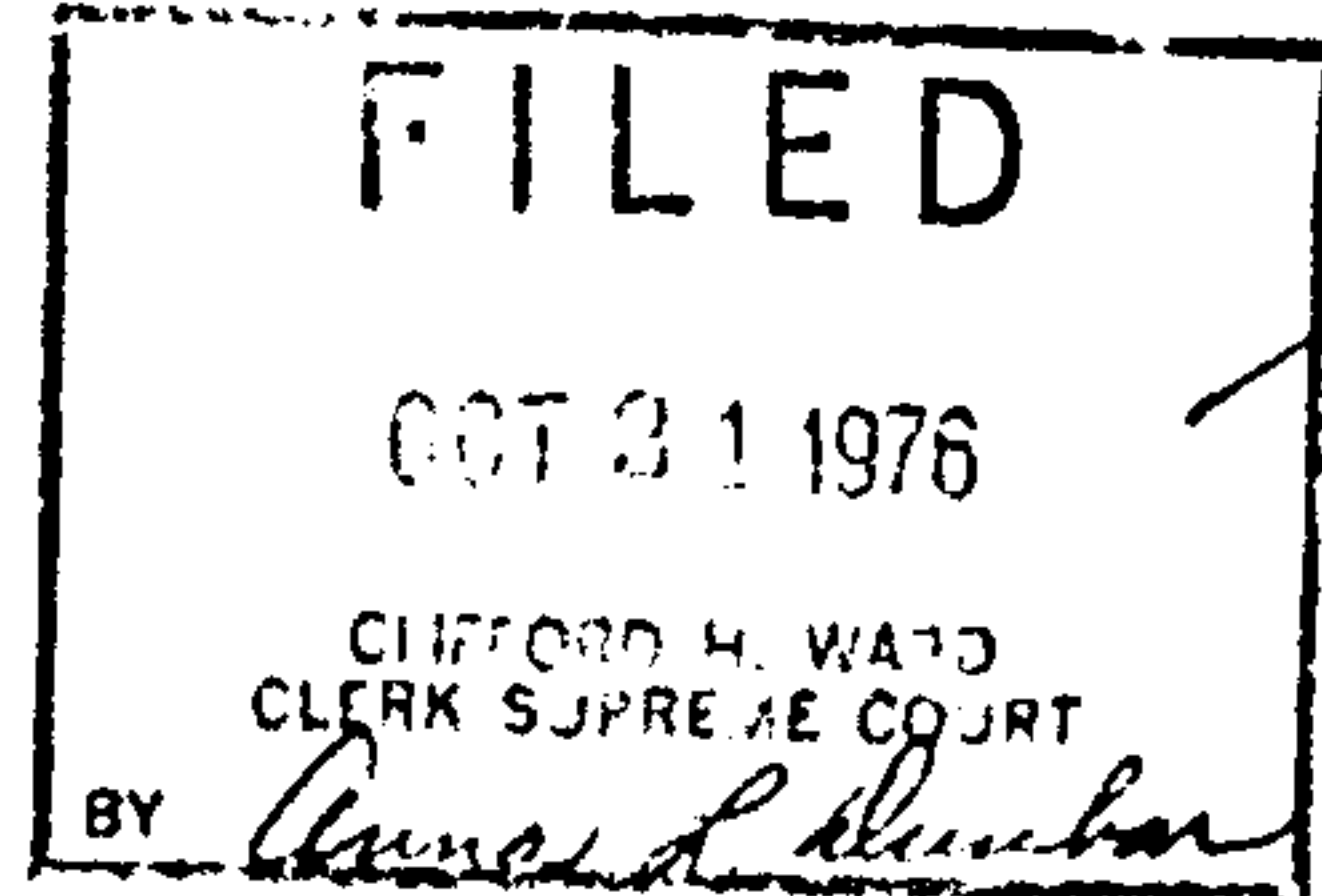


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9 IN THE SUPREME COURT OF THE STATE OF ARIZONA

10 In Banc

11 FARMERS INVESTMENT COMPANY,
12 a corporation,

13 Appellant,

14 v.

15 No. 11439-2

16 ANDREW L. BETTWY, as State Land
17 Commissioner, and the STATE LAND
18 DEPARTMENT, a Department of the
19 State of Arizona, and PIMA MINING
20 COMPANY, a corporation,

21 Appellees.

22 A PROPOSAL BY FICO

23 FARMERS INVESTMENT COMPANY,
24 a corporation,

25 Appellant,

26 v.

27 THE ANACONDA COMPANY, a corporation;
28 AMAX COPPER MINES, INC., THE ANACONDA
29 COMPANY, as partners in and consti-
30 tuting ANAMAX MINING COMPANY, a
31 partnership,

32 Appellees.

CITY OF TUCSON, a municipal corpora-
tion,

Appellant,

v.

ANAMAX MINING COMPANY, and DUVAL
CORPORATION and DUVAL SIERRITA
CORPORATION,

Appellees.

...

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1 FICO makes this proposal as a part of the rehearing
2 function of this Court for the reason it believes that only
3 this Court can effectively and expeditiously, through its
4 equitable powers, supervise and implement any attempted resolu-
5 tion of the complex legal and economic problems involved.

6 FICO realizes and appreciates that it proposes an
7 unwelcome burden upon a busy Court; it appreciates that if
8 the parties involved prefer to take their chances in con-
9 tinuing litigation and are unwilling to take the necessary
10 steps to clarify the Court's jurisdiction, the Court may well
11 feel it is not empowered to undertake the task. FICO also
12 is aware that the Court may, in any event, conclude that the
13 proposal is inappropriate at this posture of the litigation.

14 Farmers Investment Company does not subscribe to the
15 notion that litigation offers the only avenue to the resolution
16 of conflicting property claims or rights, or to the reasonable
17 satisfaction of conflicting demands upon a resource. FICO be-
18 lieves that where substantial public interests are involved
19 which may well be jeopardized or, in any event, ill-served
20 by relying upon the slow and awkward processes of litigation,
21 good faith attempts to resolve such conflicting claims on the
22 part of responsible citizens -- individual, corporate and
23 municipal -- are demanded. FICO also believes that the prestige
24 and equitable powers of this Court may fairly be looked to
25 for assistance and guidance if the other parties to this
26 cause share the purpose and beliefs which FICO has avowed.

27 First, however, FICO would make it clear that this
28 filing does not evidence an intention on its part to abandon the
29 legal battle or constitute an intimation or indication that its
30 firm intention to pursue its legal remedies, if this approach is
31 fruitless, has weakened or waned. On the contrary, it is to be
32 taken as an indication that FICO hopes that common sense may

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1 carry the day in order that the procrustean forms of the law
2 may not offer the only devices by which the present controversy
3 over water use may be resolved, in whole or in part.

4 FICO would also make it clear that its suggestions or
5 proposals are made without prejudice to its right to seek and
6 recover compensation for past and continuing losses and legal
7 expenses at some future date should such claims not be settled
8 and satisfied by mutual discussion. Neither are these proposals
9 to be taken or asserted as an indication or admission by FICO,
10 implied or otherwise, that FICO believes or concedes that it
11 has any adequate remedy or remedies available other than
12 through obtaining equitable relief. These proposals are made
13 within the framework of well respected legal principles which
14 exclude compromise proposals and discussions from evidentiary
15 status as admissions against interest or upon any other evi-
16 dentiary foundation and in a spirit of compromise in the hope
17 that further divisive, expensive and wasteful litigation can
18 be avoided.

19 FICO believes this Court does have continuing equitable
20 jurisdiction, at least as to some aspects of the controversy,
21 and that if the Court in its discretion elects to lend its
22 supervisory powers to a resolution of this problem, other
23 parties hereto who are so disposed may join in the effort. In
24 Jarvis II, 106 Ariz. 506, 510, this Court said:

25 "We think, however, that the problem is
26 critical to municipalities in Arizona and
27 so justifies our consideration even though
28 not strictly embraced within the limits of
29 the issues of the original lawsuit. As
30 indicated, Jarvis' action invoked this
31 Court's equitable jurisdiction. We issued
32 the injunction but stated that we reserved

1 the right to modify or dissolve upon applica-
2 tion accompanied by a showing of circumstances
3 as would permit the legal pumping and trans-
4 portation of ground water by the City. Our
5 decree was consistent with the almost uni-
6 versal rule that a court of equity when
7 requested will determine all the equities
8 connected with the main subject of the suit
9 and grant all the relief necessary to a com-
10 plete adjustment of the litigation. . . ."

11 FICO therefore offers to agree:

12 1. All mining defendants may continue pumping and
13 using an amount of groundwater from the critical area equal to
14 the consumptive use made of the groundwater of the area of
15 pumping by agricultural crops which were grown within the criti-
16 cal area but now no longer grown upon that area due to purchase
17 of these farms by the mining companies, provided each such mining
18 company agrees to be limited to that amount of use (except
19 insofar as hereinafter proposed). For the purposes of this
20 proposal, FICO will accept the average consumptive use deter-
21 mined for agricultural use in Avra Valley subject to subsequent
22 review if requested by any party.

23 2. In the event the mining companies and the City
24 of Tucson contract to proceed, and do proceed with expedition
25 in completing the previously discussed program for use by the
26 mines of substantially all of the effluent discharge from the
27 sewer works of the metropolitan Tucson area, FICO will not seek
28 to enjoin continuing use of groundwater by the mines of an
29 amount of groundwater equal to the effluent presently available
30 from the Tucson area sewer works, pending completion of the
31 works necessary to put such effluent to milling use, provided
32 such program is completed and the metropolitan area effluent

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1 is put to use within a period of six (6) months from this
2 date, unless this Court shall for good cause shown enlarge
3 that time limitation period. When this effluent is available,
4 the use by the mines of groundwater equal to the present effluent
5 discharge shall be discontinued.

6 3. In the event the City of Tucson and the mines
7 shall promptly undertake to and shall do all things reasonably
8 within their respective powers to contract for water from the
9 Central Arizona Project and to expedite the early delivery of
10 Colorado River water to the Tucson area, FICO will join with
11 any other parties hereto to:

12 (a) Urge this Court to favorably consider
13 delaying for a reasonable time period application
14 of the injunction awarded in favor of Duval and
15 Anamax, enjoining certain use by Tucson of water
16 from the Sahuarita-Continental Critical Area;

17 (b) Despite the decision by this Court
18 that pumping from the Sahuarita-Continental
19 Critical Area by Tucson is unlawful, thereby
20 establishing the law that FICO is entitled to
21 challenge all Tucson pumping from this area,
22 FICO will not seek to enjoin Tucson from con-
23 tinuing to pump groundwater in the amount it is
24 pumping at the present time, provided that at
25 such time as Central Arizona Project water
26 shall be available for use by Tucson, all pumping
27 from the Sahuarita-Continental Critical Area
28 will be discontinued.

29 This proposal shall be subject to the agreement of all
30 parties that it is without prejudice to any legal claims which
31 FICO may have and that it does not prejudice FICO's claims for
32 compensation for past and continuing losses and expenses to the

1 extent such may be legally established.

2 It is further subject to the acceptance by this Court
3 of supervisory review over the performance of all engagements
4 by the parties hereto. FICO recognizes that further refinement
5 of language will be required and that unforeseen complications
6 may require further discussion between the parties.

7

8

MEMORANDUM UPON THE ABOVE PROPOSAL

9 FICO presents this proposal with considerable
10 hesitation and some trepidation. FICO has hesitated because of:

11 1. Concern that the Court may consider the proposal
12 presumptuous and not appropriate to its responsibilities.

13 2. Concern that opposing interests may consider it
14 a sign of weakness and hence redouble their defensive efforts
15 (if possible).

16 3. Concern that FICO's best interests are not being
17 served by failing to vigorously pursue the remedies available
18 to FICO, disregarding all considerations except FICO's short
19 term special advantage.

20 We believe the last course mentioned, if yielded to,
21 may well result in continuing bitter litigation for the fore-
22 seeable future. Certainly the Tucson area and its citizens
23 will not be benefitted by such a result.

24 In FICO's judgment continued contention, litigation
25 and disputes should be avoided, if possible, for there is a
26 strong likelihood that while the Tucson area fiddles and fights
27 its water resources may well wind up in other hands and on
28 other lands.

29 The least FICO believes should be done is that all
30 parties should join in an effort to protect and conserve the
31 water resources available to the Tucson area, both groundwater
32 and Colorado River water, since once gone, the resource is not

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1 replaceable.

2 FICO believes that overriding public interest in
3 reaching a reasonable accommodation as between conflicting
4 claims justifies it in expressing its willingness to forego
5 pursuing its letter of the law rights if the other interested
6 parties are willing to approach the problems involved in the
7 same spirit.

8 RESPECTFULLY SUBMITTED this 21st day of October, 1976.

9 SNELL & WILMER

10 Loren W. Counce, Jr.
11 Mark Wilmer

12
13 By Mark Wilmer
14 Mark Wilmer
Attorneys for FICO

15 One (1) copy of the foregoing
16 mailed this 21st day of
17 October, 1976, to:

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